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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-258

ROBERT BLOOM, Acting Comptroller of the Currency of the United States,

Petitioner,

against

INDEPENDENT BANKERS ASSOCIATION OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN BANKERS ASSOCIATION, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

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August 24, 1976

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August 18, 1976

William H. Smith, Esq.
General Counsel
American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Independent Bankers Association of America, et al. v. Smith

Dear Mr. Smith:

This is in reply to your letter of August 16 requesting our consent as counsel for the IBAA and Robert A. Mampel, Commissioner of Banks of the State of Minnesota, to the filing of a brief amicus curiae by the American Bankers Association in support of the Comptroller's petition for a writ of certiorari and if the petition is granted, a brief on the merits.

I understand that the Solicitor General has not yet filed a petition for a writ of certiorari in this case, but that there is some expectation that he will do so shortly. I also understand that the ABA will argue in support of the Comptroller's position. Nonetheless, you may inform the Clerk of the Supreme Court of the United States that we have given our consent to your filing of such briefs amicus curiae on behalf of the ABA in the above-entitled case, should such a petition be filed by the United States and be granted by the Court.

Very truly yours,

Meyer Eisenberg

ME:ls

cc Horace Hansen
Roderick MacKenzie
Special Asst. Attorney General
State of Minnesota
Nicholas Diacou
Department of Justice

Office of the Solicitor General
Washington, D.C. 20530

August 18, 1976

William H. Smith
American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Robert Bloom, Acting Comptroller of the Currency v. Independent Bankers Association, et al.

Dear Mr. Smith:

I hereby consent to your filing a brief amicus curiae in support of the petition being filed on behalf of the Comptroller of the Currency in the above case.

Sincerely,

Robert H. Bork

Robert H. Bork
Solicitor General

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BRIEF OF AMERICAN BANKERS ASSOCIATION, AS *AMICUS CURIAE,* IN SUPPORT OF THE PETITION

Nature of Amicus' Interest

The American Bankers Association (ABA) is submitting this brief, as *amicus curiae,* pursuant to written consent by all parties concurrently being filed with this Court as permitted by Sup. Ct. R. 42.1. The ABA is a national trade association representing a broad cross-section of the nation's commercial banking industry. Its members include national and state banks, both large and small, located in each of the 50 states. Members of the ABA hold

approximately 95% of the country's commercial bank deposits.

This action is one of several pending cases* arising out of the Interpretive Ruling 7.7491, issued on December 12, 1974, and amended on May 9, 1975, by the Comptroller of the Currency (39 Fed. Reg. 44416 (1974); 40 Fed. Reg. 21700 (1975)). In that Ruling the Comptroller held that electronic customer-bank communication terminals or CBCTs operated by national banks at locations away from their head offices or licensed branches are not themselves branches under, and accordingly are not subject to, the provision of the National Bank Act governing the establishment of branches by national banks, 12 U.S.C. § 36 [hereinafter § 36]. In view of the importance to the American banking industry of a prompt and authoritative resolution of the issues presented by these cases, the ABA is before this Court as *amicus curiae* to support the Comptroller's petition for certiorari, and to express its concern regarding the resolution of these issues reached by the court below.

Summary of Argument

The development of CBCTs represents a significant technological advance unforeseen in 1927 when Congress amended the National Bank Act to permit national banks to branch. In holding that the definition of "branch" in § 36(f) covered CBCTs, the court below looked exclusively to the principle of "competitive equality" between national and state banks.** It found that principle inherent in our

* Two of those cases, *Continental Illinois National Bank and Trust Company of Chicago* v. *State of Illinois ex rel. Lignoul* and *First National Bank of Chicago* v. *State of Illinois ex rel. Lignoul*, Nos. 76-1083-84, 76-1085-86 (7th Cir., May 27, 1976), are the subject of petitions now pending in this Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

** *Independent Bankers Association of America* v. *Smith*, 534 F.2d 921 (D.C. Cir. 1976).

dual banking system, and on the basis of language found in this Court's decision in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969) [hereinafter *Plant City*] elevated it to a general standard of statutory construction.

The court below was wrong. Competitive equality between state and national banks was not the principle behind the original enactment of the National Bank Act. Nor was the creation of a dual banking system the aim of the Act. In later amendments Congress has not sought to conform national banks to state patterns. Indeed, Congress in granting limited branching authority to national banks in 1927 neither intended nor achieved competitive equality with state banks. The deferral in § 36 to state law is far too selective for that. "Competitive equality" in branching is a subsequent rationalization, not founded in any statutory language, of a political compromise reached between conflicting interest groups.

Not only did the court below follow a principle Congress did not adopt, it entirely disregarded countervailing principles Congress has adopted. Prior decisions of this Court have stressed the importance of competition as a matter of fundamental national economic policy, particularly for a highly regulated industry such as banking. This Court has recognized that state anti-branching laws are inherently anti-competitive. Instead of broadly construing the scope of § 36 to serve some illusory goal of "competitive equality" thought mandated by *Plant City*, the court below should have narowly construed § 36 to avoid expanding its anti-competitive implications.

The mistaken reliance of the court below on "competitive equality" also led it to strain the language of § 36 to avoid subjecting national banks to possible competitive disadvantages never intended, and at the same time to disregard serious practical consequences of its holding, including the application of capital requirements to CBCTs.

Correctly interpreted, the National Bank Act limits only one mode of bank competition—the office mode, a "place of business" in the words of the federal definition of "branch". The conjunction of armored car and deposit receptacle in *Plan City* was in effect a "place of business", but CBCTs are not, and accordingly are not "branches".

If CBCTs are not branches, competition will be served by leaving their development unhampered by inappropriate branching restrictions. Consumers now limited in obtaining banking services to statutorily restricted office premises will be benefited. Absurd consequences such as the application of capital requirements to CBCTs will be avoided.

The issues presented are at a critically important stage as banks seek to automate a wide range of banking transactions. CBCTs are the principal means through which retail customers may receive the advantage of electronically delivered banking services. The decision below affects not only national banks but state banks as well, through other federal and state statutory references to the federal branching definition.

The stakes are high. The use of CBCTs promises savings to consumers, merchants and banks in excess of one billion dollars per year. Many non-bank suppliers of financial services currently operate, or have the capacity to install, electronic funds transfer systems. If commercial banks, the most efficient suppliers of traditional payment mechanisms, are limited in developing electronic funds transfer systems, these savings may not be fully realized due to the absence of a major competitive force during that development.

Many banks have already installed CBCTs which aid customers in the completion of a significant volume of banking transactions. If the decision below is allowed to stand, the economics of CBCT deployment will be drastically affected. Other modes of delivering bank services may

also be called into question by the sweeping language of the court below. The importance of these issues to the banking industry and its customers warrants prompt resolution by this Court.

ARGUMENT

I

The restrictive "Competitive Equality" doctrine should not be permitted to carry § 36 beyond its originally intended scope.

The development of CBCTs and proposals for their use by national banks have presented the Comptroller of the Currency, lower courts and now this Court with the question of the proper application of the National Bank Act to technological advances unforeseen at the time any of the relevant statutory provisions was enacted. In his Interpretive Ruling the Comptroller found the operation of CBCTs to be within the incidental powers of national banks and not subject to the branching restrictions of the National Bank Act. The court below, in reaching the opposite conclusion, found its interpretive lodestar in "the principle of competitive equality between state and national banks," which it saw as the "cornerstone" of our dual banking system and on which it premised its entire analysis. But, we submit, there is no general principle of competitive equality underlying the National Bank Act. The analysis of the court below is built on a false premise.

A. "Competitive Equality" in the Dual Banking System.

The national banking system is an alternative bank regulatory pattern to those provided under the laws of the various states. Individual institutions in any one state are free to choose between the national banking system and the banking system provided under the laws of that state and to convert from one status to the other. In-

herent in this duality and in the wide differences among state laws is the expectation that there will be divergence between the national banking and state banking systems, both in the activities in which national and state banks may engage and in the restrictions and requirements to which they are subject. The idea that Congress has mandated that the National Bank Act be construed generally so as to achieve "competitive equality" so that there is no distinction between the national and state banking systems is not only unprecedented, it is inimical to the basic concept of a national banking system. Indeed, competitive equality is impossible of attainment.

"Competitive equality" between state and national banks can in no manner be construed as the principle behind the original enactments of the National Bank Act in 1863 and 1864. Rather, the legislation was adopted to establish a uniform national currency and to provide a market for bonds issued by the United States. National banks were authorized to issue bank notes and were required to purchase U.S. bonds. *See* A. Davis, *The Origin of the National Banking System* 106-110 (National Monetary Commission 1910). Moreover, the creation of a dual banking system was not the aim of the draftsmen of the National Bank Acts of 1863 and 1864. Hackley, "Our Baffling Banking System," 52 *Va. L. Rev.* 565, 571 (1966). Rather, the expectation was that state chartered banks would convert to national banks and, in 1865, a heavy tax on state bank notes was levied in an attempt to force conversions. *Id.* at 573. However, the establishment of a national banking system did not result in the elimination of state banks, and thus the "dual" banking system resulted. *Id.* Thus, an intent to require national banks to conform to state regulatory patterns cannot be read into the National Bank Act as originally enacted.

The fact that state banks were not eliminated was fortunate for the American people. The existence of two

systems has contributed to the ability of American banking to respond to the changing needs of society. Banking concepts conceived and developed under one system have frequently been adopted by the other. Perhaps ironically, the development of branch banking itself provides an archetypical example of this process in action.

Branch banking in the post-Civil War period was adopted and grew initially on the state level; by 1910 twelve states, including New York and California, permitted some form of branching. J. Chapman & R. Westerfield, *Branch Banking* 84 (1942). The National Bank Act, which had no explicit provision on branching, was interpreted as barring the establishment of branches; the only national banks with branches were those that had converted from state charters. 29 *Op. Att'y Gen.* 81 (1911). Thus, in 1911 there were 348 branches of state banks and only 12 branches of national banks. By 1921 the disparity had increased to 1,146 state bank branches as compared to 65 national bank branches, and the Comptroller started authorizing national banks to operate limited purpose offices or "teller's windows." "Branch Banking in the United States," 10 *Fed. Res. Bull.* 925, 935 (1924). The Attorney General construed the National Bank Act as allowing such offices, but this Court did not endorse his view. 34 *Op. Att'y Gen.* 1 (1923); *First National Bank in St. Louis* v. *Missouri,* 263 U.S. 640, 658 n.1 (1924).

It was clear that the national banking system was operating at an increasing competitive disadvantage, to which Congress initially responded in 1927 through the McFadden Act amendments to the National Bank Act. This first response bestowed only a modest branching authority on national banks, one which neither sought nor attained competitive equality with state banks. The McFadden Act allowed national banks to establish branches only "within the limits of the city, town, or village" in which the bank was situated, and only in states whose law permitted state

banks to do the same; broader branching remained prohibited to national banks even where available to state banks. Further, the number of national bank branches was limited in relation to the population of the city, town or village in which the bank and its branches were located, regardless of whether state banks were so limited. Ch. 191, § 7, 44 Stat. 1228.

The Banking Act of 1933 enlarged the branching authority of national banks to encompass branches beyond the municipal limits set by the McFadden Act to permit branches ". . . at any point within the State" but only to the extent authorized by state law for state banks. Ch. 89, § 23, 48 Stat. 189. But new restrictions were imposed at the same time. National bank branching authority was conferred only if there were express statutory provisions permitting state banks to establish branches; it was not enough that banks in that state were in fact branching on the basis of liberal state administrative or judicial interpretation of statutes that were ambiguous or silent on the subject. Further, national banks were (and still are) subject to the same capital requirement for the establishment of a branch as apply to the establishment of a completely independent bank in the branch location, regardless of whether state law imposed a lesser capital requirement or none at all. *Id.*, 48 Stat. 190.

It is evident that at best this legislative pattern is described with only crude and approximate accuracy, even with respect to the limited area of branching, by saying that Congress sought "competitive equality." Had that been the goal, the draftsmen would surely have chosen quite different provisions. For example, the statute could have tied national bank branching powers to whatever was the actual state bank practice. A more accurate statement of the legislative pattern is that the branching statutes reflect a Congressional resolution of a struggle between two interest groups—one composed of those bankers who

feared competition and challenges to their locational monopolies and the other composed of those bankers who thought they had more to gain than lose from competition. *See* 66 Cong. Rec. 1581 (1925) (remarks of Rep. McFadden); *Hearings on H.R. 6855 Before the House Committee on Banking and Currency,* 68th Cong., 1st Sess. 19 (1924). National and state banks could be found in each group. *See* J. Chapman & R. Westerfield, *Branch Banking* 105 (1942). The conclusion is clear: Congress was not guided by an abstract principle of ensuring competitive equality between national and state banks. The so-called "principle of competitive equality" is merely a subsequent rationalization of this struggle; it does not accurately describe either the dynamics of the legislative process or the balance struck at a particular moment in time.

The compromise reached in 1927 took the form of a specific, highly selective deferral to state law, consciously avoiding identical treatment of state and national banks. This approach of a limited deferral to state law is also found in those very few additional areas in which the distinctly separate and unified federal treatment provided for national banks is broken by reference to state law. For example, the usury provisions of the National Bank Act allow national banks the highest rate of interest permitted by state law to competing financial institutions, even where state banks are limited to a lesser rate. Furthermore, an alternative usury limitation based on the Federal Reserve discount rate is provided which relieves national banks from low state-imposed usury limits during periods of high interest rates. 12 U.S.C. § 85. Similarly, the trust powers authorized for national banks are the most liberal of those permitted to competing state-chartered firms of any type, even though the trust activities of competing state banks may not be equally broad. 12 U.S.C. § 92a. In these instances competitive advantages may flow to national banks in some states. Competitive equality with state banks was neither desired nor achieved.

The ABA believes only one conclusion can be drawn from the foregoing: the premise of the court below that "competitive equality" is the "cornerstone" of the dual banking system is not merely without support, it is demonstrably wrong. Accordingly, the critical next step in the reasoning employed by the court below is inherently flawed by its exclusive reliance on "competitive equality" as the universal touchstone for the construction of § 36 in circumstances unanticipated at the time the statute was enacted. Prior decisions and opinions of this Court which were thought by the court below to compel any such reliance should be clarified.

B. Branching under the National Bank Act.

In *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966) [hereinafter *Walker Bank*] this Court applied § 36 to invalidate efforts by national banks to establish, *de novo,* branches at locations where comparably situated state banks, under state law, would have been permitted to establish branches only through acquisition of existing banks. This decision, involving places of business which were unquestionably branches, was entirely appropriate. The issues of the case fell precisely within the narrow area as to which deference to state law is mandated by § 36(c). In that specific but limited context one may appropriately describe the mandated deference, as the Court did, as a requirement of "competitive equality."

In *Plant City,* however, this Court was called upon to move from the issue of branch establishment and location to the different and far broader issue of what constitutes a branch. *Plant City* involved an armored car with "a plate glass window, a sliding drawer and a counter on one side where customers might be served," and a teller employed by the bank, which constituted little more than a traditional branch bank on wheels, servicing a regular

schedule of stops. The case also involved an off-premises night deposit receptacle located at an armored car stop in a space leased by the bank with an adjoining writing table supplied with envelopes and transmittal slips; items left in the receptacle were counted and confirmed by bank personnel at the off-premises location when the armored car arrived—again, highly analogous to traditional branch operations. 396 U.S. at 128-129. The Court could have decided the case on that narrow ground.

Instead, the Court had recourse to the concept of "competitive equality" as a guide to construing the scope of the "branch" definition of § 36(f). Acknowledging that Congress had concluded not to incorporate state law on the issue, *Plant City* nevertheless announced that the federal construction of § 36(f), on the facts there presented, should be designed to achieve competitive equality between state and national banks.

Thereafter, a number of lower courts, including the court below, assumed this Court had elevated to a general interpretive principle the narrow *Walker Bank* exception to the otherwise divergent and unequal dual banking system. This has introduced a fundamental error into the course of decisions construing the National Bank Act—an error which can now be perceived to be of increasingly far-reaching dimensions.

The decision below illustrates the highly injurious consequences of this error. In holding that the federal definition of what constitutes a branch is to be read expansively to promote the ends of "competitive equality," the court below has entirely disregarded countervailing federal policies, has read one unambiguous provision out of § 36, and, under another provision, has directed a result with totally incongruous practical consequences.

1. *Countervailing Federal Policies.* The single-mindedness of the court below in pursuing "competitive equality"

to the limits of imagination, while arguably consonant with the reasoning of *Plant City,* flies in the face of common sense, normal tenets of statutory construction, and other prior decisions of this Court. In other contexts this Court has, for example, been unequivocal in stressing both the importance of bank competition as a matter of fundamental national economic policy and also the necessity of construing bank regulatory statutes so as not to enlarge unduly their anticompetitive impact.

Thus, this Court, in *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 372 (1963), confirmed that free competition in banking is a fundamental national economic policy:

> "The fact that banking is a highly regulated industry critical to the Nation's welfare makes the play of competition not less important but more so . . . [I]f the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected; and unless competition is allowed to fulfill its role as an economic regulator in the banking industry, the result may well be even more governmental regulation. Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy."

See also United States v. *First National Bank & Trust Co. of Lexington,* 376 U.S. 665 (1964).

Indeed, this Court has recognized that state anti-branching laws are unambiguously calculated to prevent competition. In *United States* v. *Citizens & Southern National Bank,* 422 U.S. 86, 118 (1975), Mr. Justice Stewart, speaking for the Court, stated:

> "The obvious purpose and effect of a rigid antibranching law are to make the potential bank customers of suburban, small town, and rural areas a captive market for small unit banks.[30]"

The Court in footnote 30 then added:

> "The banking business is, of course, riddled with state and federal regulatory barriers to entry. . . . But most of these barriers—*e.g.*, chartering requirements—at least arguably serve the overriding public interest in maintaining customer confidence in the industry as a whole by assuring adequate financial stability and responsible management for all banks. *Antibranching laws, on the other hand, are now widely recognized as a simple device to protect outlying unit banks from the rigors of regional competition.*" *Id.* at 118-119 n. 30 (citations omitted; emphasis added).

See also United States v. *Marine Bancorporation,* 418 U.S. 602, 612 n. 8 (1974).

Since the restraints on competition imposed by these state antibranching laws purport to be immune from attack under the antitrust laws by the doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943), and its progeny, it is particularly important that federal incorporation of state standards be strictly limited. That is consistent with this Court's own position: "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored . . . and [should] only [be] found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank, supra* at 350-51. *See Cantor* v. *Detroit Edison Co.,* —— U.S. ——, 96 Sup. Ct.. 3110 (1976); *Connell Const. Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975); *Georgia* v. *Pennsylvania R.R. Co.,* 324 U.S. 439, 456-57 (1945). By the same reasoning, the anticompetitive implications of the federal

branching statutes should not be carried beyond those mandated by Congress.

2. *Strained Statutory Interpretation.* In pursuing the mistaken goal of "competitive equality" as the underlying purpose of § 36, the court below found itself forced to amputate those parts of the statute that simply would not fit. The court recognized that its view of the federal branching statute as encompassing CBCTs would leave a state free to take the opposite course—prohibiting or restricting branches in general, but, by administrative or judicial interpretation, allowing CBCTs as being outside the statutory branch restriction. It is very clear under § 36(c) that the result would not be competitive equality for national banks; national banks can establish a branch at any point within a State (beyond the limits of the municipality in which the bank is located) only where state banks are authorized to do so ". . . by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition." The court below tried to solve the problem by pretending it did not exist: "We refuse to frustrate legislative intent by adopting this narrow reading of section 36(c)'s language." *Independent Bankers Association of America* v. *Smith,* 534 F.2d 921, 948 n. 104. The court did not suggest how any reading other than the plain meaning of the provision is even conceivable. Indeed, the obvious conclusion is that the problem arises only because the court inaccurately read Congress' intent.

3. *Practical Consequences.* It is a familiar canon of statutory interpretation that the consequences of a legal characterization should be borne in mind in determining its correctness. One of the major consequences of characterizing a device, such as a CBCT, as a "branch" is to subject it to the capital requirements for opening a branch, which, under § 36(d), are the same as for opening an independent national bank in that location. This important point was never brought to the Court's attention in *Plant City.* This means that a national bank, located in any town or city of over 50,000 population, must meet the capital requirement of $200,000 for each cash dispensing machine or counter-top electronic communication terminal that it establishes. 12 U.S.C. § 51. It is unwarranted, indeed absurd, to contend that an electronic funds transfer network of 1,000 point-of-sale terminals, which a bank might need to carry transaction information from the cash register locations of just a few large department stores, would so increase the risk of the bank's operations as to require an additional $200 million in capital! Nor is the impact limited to the capital requirements of national banks. As discussed at pp. 20-21 *infra,* state banks are also affected.

The main operative consequences of the ruling of the court below are (1) to confine, unnecessarily and artificially, the establishment of electronic funds transfer networks to national banks, in non-unit banking states, already possessing an aggregate capital greatly in excess of legal requirements, (2) to restrict severely the development of such networks by state banks in states which allow state banks to establish and operate CBCTs only to the extent to which national banks are expressly permitted to do so, and (3) as discussed at pp. 28-30 *infra,* to place national banks everywhere, and state banks in many locations, in a position of competitive inferiority to other financial institutions.

C. The Correct Interpretation of § 36(f).

Section 36 admittedly sacrifices some degree of bank competition in order to permit state policies concerning the number and location of bank branch offices to be binding on national banks. However, there is no evidence that Congress intended to allow the states to restrict competi-

tion in any form other than that afforded through conventional bank offices staffed by bank personnel.

1. *The Limited Scope of the McFadden Act.* Banks did in 1927, and still do today, compete in many ways, producing and delivering a wide range of services. They make loans to businesses and to households, they offer deposit accounts to and cash checks for corporations and individuals, they handle or manage investment portfolios for personal trusts, large pension plans and relatively small investors, they advise firms on foreign trade transactions and travelers on foreign currency transactions, and so on down a long list. Some of these activities are carried on at bank office premises, and some are not. In the field of bank loans, for example, it has long been the practice for bank personnel to call on large corporate borrowers at their headquarters. The market for small personal loans tends to be quite local, while the market for large business loans is regional or national or even international. In short, banks offer many services and compete in many markets of varying geographical dimensions.

Congress, in the McFadden Act, gave individual states authority to decide to what extent they wished to limit *one* aspect of bank competition, not *all* aspects of bank competition. Section 36(f) requires a combination of *two* elements, defining branches in terms of certain services (receiving deposits, paying checks, or lending money) delivered in a certain way (at "any branch bank, branch office, branch agency, additional office, or any branch place of business"). That is not the only way for delivering those services, then or now, but it is the only way that Congress subjected to constraints determined by state law.

This Court in *Plant City* foresaw the consequences of turning the McFadden Act into a sweeping abdication to the states of authority over all forms of bank competition carried on off-premises: "to allow the States to define the content of the term 'branch' would make them the sole

judges of their own powers." 396 U.S. at 134. For that reason, the Court held that the definition of a branch is exclusively a question of federal law. But when the federal definition of "branch" in § 36(f) is read to ignore the words "place of business," so as to focus only on the bank services referred to therein, and then a spurious concept of competitive equality with state banks is injected (as the court below has done), the result is nonetheless to confer upon the states vastly enlarged power to act as sole judges of the extent of bank competition they will allow. Such an expansion of state power to restrict competition in banking runs counter to both general federal economic policy favoring competition and the very limited delegation of authority to the states which Congress actually made in the McFadden Act.

2. *Application to CBCTs.* If the McFadden Act and the Banking Act of 1933 are read, in accordance with the statutory language and the legislative history, as defining branches in terms of staffed office premises offering listed services, then CBCTs, in the normal course, will not be encompassed. Whatever the functions in which it plays a part, neither a point-of-sale communication terminal on a retail store's counter nor a remote automatic terminal in a railroad station or other high traffic location constitutes a bank office in the sense that Congress intended in 1927. Instead, it is a non-office way of delivering or making particular bank services more accessible to customers, as is a bank credit card or the bank officer who attends an off-premises closing to disburse the proceeds of a loan.

3. *Consistency with Federal Policies.* An interpretation of § 36(f) that does not encompass typical CBCT usage is consistent with the prior decisions of this Court referred to at pp. 12-13, *supra*. Those cases correctly stress the importance of bank competition as a matter of fundamental national economic policy and the necessity of

construing bank regulatory statutes so as not to enlarge unduly their anticompetitive impact. Competition in banking will surely be better served by freeing the development of CBCTs from the inappropriate restrictions of branching statutes and leaving that development to normal market forces. As a consequence of that course, the anticompetitive impact which presently flows from geographic restraints imposed by branching statutes will not be increased and may well be diminished. Consumers of banking services who are now limited in obtaining such services to "bricks and mortar" office premises will be benefited by the additional choices available.

Viewed historically, CBCTs are not unique in their potential for enlarging bank market areas and thus expanding the domain of effective competition. Any new technology that reduces the costs of customer access to bank services and thereby enlarges the area of effective bank market competition will have such an effect; in their turn, the development of the telephone and automobile broadened bank service areas, to consumers' lasting benefit.

While the direction of the effect CBCTs will have on bank competition is clear, its magnitude is not. Because the development of CBCTs is still in a formative stage, it is not yet possible to gauge what the extent of the effect will be. All that can be said at this point is that consumers should not be denied the benefit of efforts made by banks generally to improve the quality of banking services through electronic means.

Ultimately, experience with CBCTs may reveal significant impacts on the structure of banking. But the consequences of such impacts should be left to Congress. The courts should not now expand the choice made in 1927 by the Congress to limit state imposed restrictions upon competition to the narrow subject of the placement of staffed bank offices.

D. Summary.

If CBCTs are not branches under the § 36(f) federal definition, troublesome issues such as the applicability of capital requirements do not arise. This is not to deny that the effect of the selective deferral by Congress to state law in § 36 was to impose a limited form of competitive equality; but the concept of competitive equality is useful, if at all, only with respect to the issues of whether, how and where branches may be established. On the question of what constitutes a branch, Congress chose not to defer to state law but rather to write its own definition, presumably in full recognition that some states might adopt different definitions. That Congress should have chosen to do so is fully consistent with the generally divergent pattern of state and national bank regulation.

II

This action involves issues of extreme importance to the banking industry and its customers which deserve resolution by this Court.

Aided by recent developments in computer and communications technology, the American banking industry is currently engaged in automating the means by which a wide range of banking transactions are effected. The decade of the 1960s saw the broad-scale use of computers to process the checks, advices and other paper instruments which were then universally used to effect banking transactions; the decades of the 1970s and 1980s promise the extension of this technology to the execution of these transactions by electronic rather than paper-based methods. Automatic deposit of Social Security payments, automated clearing houses, book-entry securities transfer systems and electronic networks for settling foreign currency transactions are just a few examples of recently developed systems for electronically effecting funds transfers and other

banking transactions. More advanced versions of these electronic systems for executing other types of transactions are currently the subject of further development. Each of these advances has offered cost savings and increased speed, convenience and accuracy in facilitating the commercial life of the nation.

CBCTs represent the principal means through which retail customers can obtain electronically delivered banking services. There is little prospect that electronic funds transfers will in the foreseeable future entirely displace any of the conventional consumer payment mechanisms such as currency, checks and paper credit-card slips. It is already apparent, however, that CBCTs can complement these conventional mechanisms in a manner which is highly desirable to banks, to consumers and to merchants and other recipients of consumer payments. For a general discussion of the potential benefits and problems of widespread deployment of electronic funds transfer systems and CBCTs, see Arthur D. Little, Inc., *The Consequences of Electronic Funds Transfer—A Technology Assessment of Movement Towards a Less Cash/Less Check Society* 12-19 (National Science Foundation Report 1975) [hereinafter *ADL Report*].

The present case involves issues central to the legal framework which will govern a major segment of the banking industry in its efforts to realize, and to offer to the public, the advantages of CBCTs. The legal question directly presented by the case is whether the locational, capital and other requirements of the branching provisions of the National Bank Act apply to the installation and operation of CBCTs by national banks.

However, the impact of the case extends even beyond national banks. State banks, for example, may be significantly affected. Section 9 of the Federal Reserve Act, 12 U.S.C. § 321, subjects "outside" branching (the operation of branches outside the limits of the municipality in which

the bank is located) by state bank members of the Federal Reserve System to the same restrictions applicable to such branching by national banks. In addition, as of December, 1974, 28 states had general "wild card" statutes authorizing state banks directly or upon state regulatory approval to engage in any activity authorized to national banks. Under such statutes state banks either are or could be authorized to operate CBCTs to the same extent as national banks, thus incorporating by reference the meaning of § 36 into those state laws. *See* American Bankers Association, *Remote Electronic Facilities: An Analysis of Enabling Acts* 9 (1976). In many of these states such general "wild card" statutes are supplemented by specific authorization to operate CBCTs. But at the present time, at least 12 of these 28 states have not enacted enabling legislation permitting state banks to operate CBCTs. Thus, the authority for state banks located in those 12 states may be dependent upon the outcome of this case.

In addition, since 1975, certain states have adopted specific CBCT "wild card" statutes. In North Dakota and New Hampshire, state banks may operate CBCTs to the same extent as national banks, while Rhode Island state banks may operate CBCTs to the extent permissible for any federally regulated financial institution, including, but not limited to, national banks. *Id.*, App. D.* The construction of the § 36(f) "branch" definition resulting from the current litigation can also be expected to exert an influence in other states, such as Alaska, Hawaii, Indiana, Michigan, Minnesota and New Mexico, where existing branching provisions contain a definition comparable to § 36(f) and CBCTs are not otherwise authorized by state law.

As will be illustrated below, there are practical and

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* The "wild card" aspect of the original Virginia CBCT statute has since been replaced with a specific authorization for state banks to operate CBCTs. Va. Laws of 1976, ch. 554.

sweeping ramifications that must flow from the Court's resolution of this question; they are of crucial concern not only to the banking industry, but also to consumers and retail merchants.

A. Impact on the Cost of Consumer Payments.

If the natural growth of the installation and usage of CBCTs is allowed to continue, significant reductions in the cost of effecting consumer payments can be expected. Although the direct impact of many of these costs falls, in the first instance, on banks and the recipients of consumer payments, ultimately these costs are passed on to the consumer in the form of higher merchant prices and higher fees for banking services. Other less tangible costs are borne by consumers in the form of the delays and inconvenience involved in the existing payment mechanisms. While these costs are less easily quantified, their aggregate magnitude for billions of transactions is huge, as will be appreciated by anyone who has attempted to cash a check while away from home or after banking hours, or waited while a store clerk telephones to obtain credit card approval, or found a trip to his bank required in order to make a simple deposit, withdrawal or account transfer.

Consumers presently write approximately 15 billion checks per year. Over 4 billion of these are payable to food stores, retail shops or retail gasoline vendors. *ADL Report* 50-51. In the main these checks are given by consumers at the time when goods are received or services rendered, *i.e.,* at the point of sale. The total cost of such a point-of-sale transaction is very substantial: direct time costs to the consumer while the retailer obtains and records identifying data regarding the consumer; clerical costs to the retailer in examining consumer identification, in reconciling cash register receipts at the close of the day and in depositing checks in the retailer's banks; bad debt losses incurred by the retailer from dishonored checks; and check processing costs to the depositary and drawee

banks. Costs to the retailer and direct costs to the consumer are variously estimated, but a per transaction cost to them in the range of 20¢ is typical; bank processing costs alone are about an additional 18¢ per transaction. *Id.* at 51-52. Significantly higher retailer costs attributable to bad check losses are widely experienced.

If point-of-sale CBCTs are extensively deployed, a majority of these check transactions can be handled in an electronic mode—including the electronic verification of the check-writer's identity and his or her demand account balance, functions already effected by some banks through electronic terminals. Although the Comptroller's Ruling did not deal with the use of a device whose sole function was limited to check authorization, it is a clearly useful service which can be performed by a CBCT as an ancillary function. Some point-of-sale check transactions will be eliminated to the extent cash dispensing CBCTs reduce the need to cash checks in retail establishments. By typical estimates, savings in bank processing costs of between 5 and 8¢ per transaction can be achieved through this conversion, and per transaction savings by retailers and consumers of at least that magnitude will result. *Id.* at 96. In total, the cost of a point-of-sale check transaction can be reduced from the range of 35-38¢ to the range of 20-25¢. To err on the side of underestimation, if the saving is 10¢ per transaction on only one-half of the current 4 billion point-of-sale check transactions per year involving checks payable to food stores, retail shops and retail gasoline vendors, the aggregate savings will will be approximately $200 million each year.

Comparable savings may be anticipated on many of the other types of check transactions that make up the remaining 11 billion consumer checks written each year. However, in the absence of reliable cost data, estimates of savings would be speculative at best. The volume of transactions is so large, however, that savings per transaction

averaging only a few cents will yield total savings in the hundreds of millions of dollars each year. For example, if a 10¢ saving per transaction is achieved on the average in one-half of these additional consumer check transactions, the annual savings would be about $550 million per year.

CBCTs also promise significant reductions in the cost of credit card transactions. The current annual number of credit card transactions is over 5 billion at a cost ranging from approximately 35¢ to 70¢ per transaction, depending on whether telephone authorization from the credit card issuer is necessary. *Id.* at 56. If such costs can be reduced to the 20-25¢ range in as few as one-half of the transactions, savings in excess of $250 million per year will be realized.

The foregoing categories of transactions, in which we have roughly estimated the cost savings that are likely to be realized, represent about eight percent of the total number of payment transactions which occur each year in the United States. There are about 250 billion transactions annually, of which about half are either non-currency or currency transactions in an amount over $2 and are suitable for electronic processing. *Id.* at 43. Only a small percentage of the total was discussed above, because independently published data bearing on probable cost savings are available in those transaction categories. Savings in excess of one billion dollars per year in those transactions are indicated—thereby making those resources available for other productive uses. Unpublished data available to the ABA indicate that significant savings are also likely to be realized in many of the remaining ninety-two percent of transactions. Moreover, these *annual* savings will increase with the passage of time as further advances are made in the new technology. The delays in the implementation of this technology threatened by the decision below would constitute a most significant loss to the American people, as well as an erroneous reading of Congressional purpose.

B. Impact on Existing CBCT Operations.

The Court's resolution of the instant case will have an obvious practical result on existing CBCT operations. Notwithstanding the unsettled legal status of CBCTs, the savings which may be realized are so large that a number of commercial banks have already installed and are operating them.

As of June 30, 1976, the records of the Office of the Comptroller of the Currency indicated that a total of 73 national banks, located in 30 states and the District of Columbia, had installed 225 CBCTs, of which 99 were unmanned automated terminals and 126 were point-of-sale (POS) devices. The June 30, 1976 statistics represent a 25% increase in the number of units, and a 103% increase in the number of banks, over comparable figures from a year earlier. Other financial institutions share in the use of certain of these CBCTs under arrangements with the installing bank. Based on the most recently available statistics concerning mean average monthly transaction volumes for both on-premises automated teller machines and off-premises unmanned CBCTs, it is projected that the unmanned automated terminals covered by these notifications are currently handling in excess of 150,000 transactions a month. Liebtag, "100 New Cash Machines, ATMs a Month," *American Banker*, July 14, 1976, at 1, col. 3. These statistics indicate that individual unmanned CBCTs presently handle an average of approximately 1,500 transactions per month, with transactions in excess of 18,000 per month occasionally reported for some of these units. Present estimates place average POS terminal usage at approximately 200 transactions per month, adding an aggregate of another 25,000 transactions presently effected through national bank CBCTs each month.

Virtually all of the existing commercial bank CBCTs have been installed within the last five years. As recently as 1972 commercial banks had installed only four off-premises CBCTs. L. Zimmer, *Cash Dispensers and Automated Tellers* 6 (1972). If the growth rates indicated by these statistics are projected into the future, it can be anticipated that, unless artificially encumbered by legal restrictions, future growth in the number and usage of CBCTs, responding to cost savings and customer demand, will be truly impressive.

If, on the other hand, the decision of the court below is allowed to stand, it is certain not only that the future deployment of CBCTs will be curtailed but that the operation of some number of the existing CBCTs will have to be terminated. Indeed, the District Court, on Respondents' motion, has ordered the Petitioner, the Comptroller of the Currency, to formally rescind his Interpretive Ruling. *Independent Bankers Association of America* v. *Smith*, Civil No. 75-0089 (D.D.C., July 29, 1976). Furthermore, the economics of continued operation of all national bank CBCTs will be adversely affected by the costs of compliance with the capital, regulatory approval, and other "branch" requirements of the National Bank Act, and by a diminished capacity to achieve economies of scale to the extent those requirements impose artificial limitations on the aggregate number of CBCTs ultimately capable of being operated by individual banks. It is true that these results could be ameliorated through legislation. But it would be a long, hard struggle among contending interests that in the end, even if successful, would impose upon Congress the burden of correcting an error which should never have occurred and upon the public the costs of all the interim delay.

C. Questions Regarding Existing Practices.

If left standing, the decision below portends an impact far beyond CBCTs. Exalting a misconception it derived from *Plant City*, the court below has, in effect, announced that any device or facility offered by a national bank which provides locational convenience to customers, whether traditional or newly developed, is potentially to be considered a "branch." The sweeping implications of this prospect are deeply disturbing to the banking industry.

This prospect is particularly troublesome in connection with electronic terminal devices established for use by corporate customers. This recent development, essentially automating the communication link between banks and their major corporate customers, has the distinct potential for becoming a major factor in the competition for corporate accounts. *See* "Chase Initiates System for Cash Management," *American Banker*, May 19, 1976, at 3, col. 3. Given the interpretation of § 36(f) of the court below, all national banks, and some state banks, must anticipate the possibility of being restricted to using this mode of competition only in places in which a branch can be established, and of being totally barred from its use in out-of-state markets.

This outcome is distressing; as the importance of these terminal facilities increases, major disruption of long-standing banking relationships with distant corporate customers where such communications links are barred may be foreseen. Even more distressing, because of its impact on society, is the potential this result carries for increased costs to corporations, and consequently to the customers of these corporations, as otherwise accessible banking alternatives are lost. As this Court observed in *United States* v. *Philadelphia National Bank, supra,* a lessening of rivalry among banks as sources of capital tends to be transformed into higher costs and to limit competition among corporate customers served by the banking industry. 374 U.S. at 369-70, 372.

Numerous other situations might be cited where the mistaken rationale of the court below, if left standing, could lead to senseless results. The traditional off-premises ac-

tivities of national banks, and some state banks, ranging from mortgage banking, data processing and similar services to the services offered to or through correspondent banks, may be called into question; they may be viewed as part of a banking function, and of course they all occur at a "place."

The ABA does not concede the inevitability of any of these prospects, or even suggest that courts in other circuits will not in some way call a halt to the absurdities which could follow from the misconceptions of the court below. However, it is clear that substantial uncertainty has been infused into the law directly or potentially affected by the analysis adopted by the court below. In and of itself, this uncertainty cannot but adversely affect decisions by banks in these areas until definitely resolved by this Court.

D. Impact on Competitive Balance Between Banks and Other Financial Institutions.

The context in which the decision of the court below poses perhaps the most significant threat to the banking industry is its potential impact on the ability of banks to compete effectively with other suppliers of consumer financial services. Commercial banks compete with one another as the court below recognized. But commercial banks also compete with a number of other types of consumer-oriented financial institutions, including savings banks, savings and loan associations, credit unions, finance companies and even retail merchants. The intensity of this competition has been increasing recently as various types of thrift institutions in certain states have been granted demand deposit powers and expanded consumer lending authority.* In offering services through

* Even without formal demand deposit authority, thrift institutions offering savings accounts accessible through networks of CBCTs can provide consumers with a service which in many ways is the functional equivalent of a commercial bank checking account.

devices comparable to CBCTs, virtually none of these other types of organizations are subject to legal restrictions of the breadth of those which would be applicable to national banks under the decision of the court below. In fact, some are completely unfettered by legal restrictions on the number or location of these devices.

If the outcome of the present action has the effect of prohibiting some banks from utilizing CBCTs (for example, those in unit banking states), the result will be an obvious impairment of the ability of those banks to compete with other institutions which provide similar financial services but offer the added convenience of electronic delivery systems. In states which permit branching or CBCTs, limitations on the number (as a result of capital requirements, for example) and location of CBCTs operated by a bank will hamper competition. The services offered through a limited bank network of CBCTs will suffer in comparison with those provided by an organization free to establish a more widespread system. Moreover, banks may well be unable to match the lower fees charged by others whose CBCT networks operate at a higher degree of efficiency because of the greater number of devices and transactions being handled through the central computer facilities. Still other economies of scale can be realized by organizations with large-scale CBCT operations, such as quantity discounts by equipment vendors and more highly specialized and experienced staffs.

As has been noted by this Court in numerous other contexts, the ultimate victim of this type of constraint on competition is the consumer. More significant than any competitive disadvantage imposed upon banks, as compared with other financial institutions, is the disadvantage to society which will result from restricting banks from offering CBCT services. Commercial banks are currently the most cost-efficient suppliers of paper-based services which electronic funds transfer systems are beginning to supplement and may eventually replace in large part.

Commercial banks have offices in nearly every city, town and village in the United States. To hobble commercial banks in freely experimenting with the delivery of electronic funds transfer services through CBCTs will deny the public the benefit of obtaining, through the interplay of competition among all institutions, electronic funds transfer services from those institutions which in open competition have demonstrated their ability best to satisfy the requirements of the public.

Conclusion

The decision of the court below involves issues of sweeping importance to the banking industry and its customers which warrant prompt resolution by this Court. Although grounded in language derived from this Court's opinion in *Plant City,* the decision is unsound for reasons which appear not to have been briefed or considered in connection with the *Plant City* decision. Accordingly, the petition for certiorari should be granted. If it is, the ABA intends to seek leave to file a brief further detailing its position on the merits of the issues outlined herein.

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